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No. 07-618

FILED

JAN 9 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. AND TKS (USA), INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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January 9, 2008

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QUESTIONS PRESENTED

1. Whether a U.S. court may enjoin a foreign action after satisfaction of the judgment entered by the U.S. court when the foreign action does not involve a relitigation of the issues or causes of action in the domestic lawsuit and has been brought under a law enacted by a foreign sovereign to vindicate its rights established by the World Trade Organization.

2. Whether the Eighth Circuit's treatment of international comity as applied to an antisuit injunction merits review when, as an independent basis for its decision, the court found that the prerequisites for a foreign antisuit injunction were plainly not satisfied.

STATEMENT PURSUANT TO RULE 29.6

The petition properly identifies the parties to this proceeding. Pursuant to Rule 29.6 of the Rules of this Court:

Respondent Tokyo Kikai Seisakusho, Ltd. does not have any parent corporation, and no publicly held corporation owns 10 percent or more of Tokyo Kikai Seisakusho, Ltd.'s stock.

Respondent TKS (U.S.A.), Inc. is 100% owned by Tokyo Kikai Seisakusho, Ltd. and is not a publicly held corporation or other publicly held entity.

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INTRODUCTION

Respondents Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc. ("TKS") respectfully submit this brief in opposition to the Petition for a Writ of Certiorari (the "petition") filed by petitioner Goss International Corp. ("Goss"). The petition should be denied.

Petitioner seeks review of a decision of the Eighth Circuit reversing the district court's grant of a foreign antisuit injunction that prevented a Japanese company from commencing an action in Japanese court, against a Japanese affiliate of Goss's, and under a Japanese law that creates an entirely different cause of action and requires proof of facts totally distinct from those at issue in the domestic lawsuit.

The Eighth Circuit opinion does not present the questions, or the conflicts with other decisions, that petitioner alleges. Rather, the Eighth Circuit's decision is a straightforward application of settled law to a unique set of facts and has exceedingly limited application to other cases.

There is no merit to petitioner's principal claim that the Eighth Circuit's decision conflicts with the Second Circuit's ruling in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007). Both circuit panels relied upon meaningfully similar tests to determine whether a foreign antisuit injunction could appropriately issue – namely, whether the foreign action as to which the antisuit injunction is sought would relitigate issues addressed in the domestic action. Addressing quite different facts, the two circuits unremarkably arrived at different

conclusions. Indeed, the Second Circuit decision – issued after the Eighth Circuit's decision – expressly acknowledged that the different facts involved in the two cases explained why the two circuits resolved them differently. What petitioner describes as a circuit "split" is merely two circuits engaging in highly fact-bound applications of consistent legal principles.

In addition, petitioner errs in asserting that the Eighth Circuit decision would enable this Court to address the circuits' divergent approaches regarding the weight to give to international comity in the context of foreign antisuit injunctions. The Eighth Circuit found that petitioner's motion for an antisuit injunction failed on the preliminary ground that the foreign action is not a relitigation of the domestic action. Thus, the court had no cause to discuss comity issues except as general dicta. And, to the extent international comity may be relevant, it strongly supports the outcome in this case under any of the applicable standards. This case thus provides the Court with no meaningful opportunity to address any perceived divergences among the circuits on this comity issue.

While petitioner does not even suggest that the Eighth Circuit decision conflicts with decisions of this Court, certain *amici* argue that the Eighth Circuit decision departs from broad jurisdictional principles endorsed by the Court. In fact, the broad questions presented by the *amici* briefs are neither raised here nor addressed by the Eighth Circuit in deciding this fact-bound case. To the contrary, the Eighth Circuit's decision is fully consistent with the jurisdictional holdings of this Court and of the courts of appeals. This is, at base, a unique case involving a repealed U.S. statute, lengthy WTO proceedings, and a

Japanese law that is applicable *only* to the Japanese affiliates of the parties now before this Court. Certiorari should be denied.

COUNTER-STATEMENT OF THE FACTS

1. In 2000, petitioner brought suit against TKS (and other parties) under the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004) (the "1916 Act"). The Act prohibited foreign exporters from "dumping" – *i.e.*, selling merchandise in the United States at prices substantially below those at which they sell such products in their home countries, provided they do so with certain prohibited intent. The 1916 Act provided for a private cause of action for domestic parties injured by such imports, and authorized the automatic trebling of damages plus attorney's fees. Only one final judgment was entered against a defendant under the Act during its nearly 90-year history – the judgment against TKS in favor of Goss in 2003. *Goss Int'l Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft (Goss I)*, 434 F.3d 1081, 1083-84 (8th Cir.), *cert denied*, 126 S. Ct. 2363 (2006).

2. In the late 1990s, the European Communities ("EC") and Japan separately requested that the World Trade Organization ("WTO") establish a dispute settlement panel to determine whether the 1916 Act was inconsistent with the WTO Anti-Dumping Agreement. Pet. App. 5a n.3.[1] In 2000 both

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[1] In 1994, Congress approved the WTO Agreement. 19 U.S.C. § 3501 *et seq.* The WTO Agreement incorporates the most recent version of the General Agreement on Tariffs and Trade (the "GATT 1994") and its ancillary agreements, including the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Anti-Dumping Agreement").

WTO panels found that the 1916 Act violated the GATT 1994 and the Anti-Dumping Agreement. *Id.* The panel handling Japan's complaint concluded that "since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to Japan under the WTO Agreement" and suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act." Complaint by Japan, Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS162/R, ¶¶ 6.289(g), 6.292, at 204, 205 (May 29, 2000).

The United States appealed both decisions to the WTO Appellate Body, which sustained the panels' rulings. Thereafter, in September 2000, the Dispute Settlement Body ("DSB") adopted the panel and the Appellate Body reports and formally requested that the United States bring the 1916 Act into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement. Pet. App. 5a n.3. The United States then informed the DSB that it would implement the DSB's rulings and recommendations by repealing the 1916 Act. *Id.*

In January 2002 the United States still had not repealed the 1916 Act so the EC and Japan sought authorization from the WTO to suspend concessions granted to the United States, and the matter was referred to arbitration. Pet App. 6a n.3. The United States, however, requested that the arbitration be suspended because "a proposal to repeal the 1916 Act and to terminate cases pending under the Act was being examined by the U.S. Congress." World Trade Org., *United States – Anti-Dumping Act of 1916, Summary of the Dispute to Date* (August 20, 2007), *available at* http://www.wto.org/English/tratop_e/

dispu_e/cases_e/ds136_e.htm. Based in part on this representation, Japan and the EC agreed to suspend temporarily the arbitration with the right to resume the proceedings if no substantial progress was made by June 2002. *Id.* In September 2003, because of the United States' continued failure to repeal the 1916 Act, the EC reactivated the arbitral proceedings. See Minutes of DSB Meeting of October 2, 2003, WT/DSB/M/156, at 2 (Nov. 10, 2003); Minutes of DSB Meeting of November 7, 2003, WT/DSB/M/157, at 3 (Dec. 18, 2003).

On February 24, 2004, the arbitrators in the EC's dispute concluded that the measure of "nullification or impairment of benefits" should specifically include "any final judgments entered against EC companies or their subsidiaries under the 1916 Act . . . up to the cumulative dollar or monetary value of the final judgments." Recourse to Arbitration, Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916*, WT/DS136/ARB, ¶ 5.58, at 23 (Feb. 24, 2004). The ruling also determined that future judgments and settlements were to be included in the calculation of "nullification or impairment," and "[w]hat would be relevant for the purpose of this calculation would be the total monetary value of such judgments under the 1916 Act . . . which could be matched by the suspension of obligations by the European Communities of an equivalent monetary amount." *Id.* ¶ 6.6, at 27.

3. Congress repealed the 1916 Act in December 2004. The legislative history acknowledged that the repeal was undertaken to comply with the United States' obligations under the WTO Agreement. H.R. Rep. No. 108-415, at 2 (2004). Likewise, the House Report indicated that the 1916 Act was obsolete and not necessary to protect the United States from

dumping of foreign products into the U.S. market. See *id* at 3. Congress, however, repealed the 1916 Act prospectively, thus leaving the litigation then pending between petitioner and TKS in the Northern District of Iowa unaffected. Consequently, Congress reneged on the repeated promises made by the Executive Branch to the DSB and our WTO partners that the repeal of the 1916 Act would expressly "provide that no judgments pursuant to actions under such Act shall be entered on or after 26 September 2000" – the latter being the date of the DSB's adoption of the panel and Appellate Body reports. See Minutes of DSB Meeting of March 8, 2002, WT/DSB/M/121, at 2 (Apr. 3, 2002).

4. In light of the United States' failure, despite its assurances, to repeal the 1916 Act retrospectively, Japan enacted legislation on December 8, 2004, "to protect the persons who incurred losses pursuant to [the 1916 Act], and thus contribute to the healthy development of the nation's economy." Special Measures Law, Law No. 162 of 2004, art. 1. The Special Measures Law authorizes Japanese companies, such as TKS, which are compelled to pay damages under the 1916 Act, to seek indemnification in Japanese courts from any Japanese affiliate of the U.S. company that obtained such damages.

5. On June 15, 2006, the district court issued an Order granting petitioner's motion for a preliminary injunction preventing TKS from asserting or pursuing its rights in Japan under the Special Measures Law. The court concluded that all four factors set forth by the Eighth Circuit in *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc), weighed in favor of the issuance of a preliminary injunction. Pet. App. 83a.

The Eighth Circuit unanimously reversed. Beginning its discussion with a review of the standards applied by various courts of appeals when addressing comity issues in the context of foreign antisuit injunctions, the court of appeals noted broadly that the courts of appeals come within one of two camps: "conservative" circuits which tend to be more deferential to comity considerations and "liberal" circuits that tend to be less deferential. Pet. App. 9a-11a. Should a court need to balance comity considerations when reviewing a foreign antisuit injunction, the Eighth Circuit decided to side with those "conservative" circuits that are more respectful of foreign interests. *Id.* at 11a.

The Eighth Circuit next noted that parallel proceedings in a domestic and foreign court should generally be allowed to proceed simultaneously "'at least until a judgment is reached in one action'" which can be pled as res judicata in the other. Pet. App. 22a (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984)). The court further concluded that only after this threshold point is reached, can a court consider other factors, such as "protecting United States jurisdiction, preserving important United States public policies, and balancing domestic interests with the principles of international comity." *Id.* at 17a (citing *Laker Airways*, 731 F.2d at 926-45).

Based on this framework, the Eighth Circuit determined that a foreign antisuit injunction prohibiting TKS from pursuing its rights under the Japanese Special Measures Law was inappropriate. It reasoned that "the United States courts are being asked to prevent TKS from seeking a remedy available solely in Japan," which is "entirely new and original" and "of a different kind or . . . principle than

that of the prior decree." Pet. App. 22a (internal quotation marks omitted). It thus held that the foreign action was not a relitigation of the domestic action. Because no relitigation was at issue, no justification remained for the district court to assert that its jurisdiction over the prior U.S. action vested it with authority to enjoin proceedings wholly under Japanese law. *Id.* at 28a-29a.

Although this jurisdictional ruling was dispositive, the court of appeals also addressed the district court's treatment of international comity concerns. Noting Japan's strong interest in the Special Measures Law, the Eighth Circuit held that the "United States Executive and Legislative Branches, not the Judiciary," are the appropriate governmental branches to address any diplomatic issues arising from the Japanese law. Pet. App. 27a. Accordingly, the court of appeals concluded that "the jurisdictional circumstances *and* comity considerations . . . . under the facts of this case, [lead to the determination that] the maintenance of the antisuit injunction on a satisfied judgment cannot be justified." *Id.* at 28a-29a (emphasis added).

REASONS FOR DENYING THE PETITION

The unremarkable decision of the Eighth Circuit does not warrant this Court's review. Petitioner's assertion that there is a conflict between the Eighth and Second Circuits ignores the basic point that both circuits simply reached different conclusions as they applied similar standards to vastly different facts. Similarly, petitioner's claim that the lower court deepened divergence among the circuits on the question of deference to international comity in the context of foreign antisuit injunctions is fatally undermined by the Eighth Circuit's threshold

determination that petitioner's foreign antisuit injunction motion failed, apart from and *before* the court addressed comity considerations. The vacatur of the injunction and dismissal of this action were entirely consistent with this Court's precedents. The Eighth Circuit applied well-settled principles to a unique situation in which all the relevant laws are either repealed or have no effect beyond the parties to this case.

I. NO CONFLICT EXISTS BETWEEN THE DECISIONS OF THE EIGHTH CIRCUIT AND THE SECOND CIRCUIT.

Petitioner initially seeks to have this Court review what it describes – wrongly – as a "direct conflict" between the Eighth Circuit's decision and the Second Circuit's decision in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007). Pet. at 16. Petitioner asserts that the "Second Circuit specifically rejected the Eighth Circuit's holding and rationale in this case." *Id.* at 17. These assertions are, however, demonstrably incorrect.

Ignoring the plain language of the opinions, petitioner asserts that *Goss* and *Karaha Bodas Co.* make sweeping holdings on the question whether a federal court possesses jurisdiction to enjoin a defendant from pursuing litigation in a foreign court after the defendant has satisfied the court's adverse judgment. Pet. at 16-19. Neither case does so. Rather, in both cases, the touchstone inquiry is whether the foreign action was a relitigation of the domestic action. The Second Circuit held that the foreign action was a relitigation of the issues that had already been presented and resolved in the domestic proceeding and, consequently, the federal court had ancillary jurisdiction to issue the antisuit injunction.

Karaha Bodas Co., 500 F.3d at 121-23. The Eighth Circuit, by contrast, recognized that there would be no relitigation in this case. Any foreign action under Japan's Special Measures Law could proceed only on the basis that a valid U.S. judgment had been rendered against TKS. So long as that judgment could be challenged, proceedings could not be commenced in Japan pursuant to the Special Measures Law. Accordingly, in the absence of any relitigation of issues underlying the domestic suit, the district court had no basis upon which to assert that its jurisdiction continued once the judgment had been satisfied. Pet. App. 20a-23a. In other words, although the Eighth Circuit and Second Circuit reviewed very different sets of fact, their analyses are fully consistent.

Specifically, in *Karaha Bodas Co.*, the Karaha Bodas Company ("KBC") received a large award arising out of a Swiss arbitral proceeding stemming from a joint development deal with Pertamina, an Indonesian oil and gas company. Pertamina refused to pay this award and KBC initiated confirmation and enforcement proceedings in federal courts in the Southern District of Texas and Southern District of New York. Both courts agreed that the arbitral award should be enforced and were respectively affirmed by the Fifth and Second Circuits. Pertamina satisfied the judgment but then immediately brought a lawsuit against KBC in the Cayman Islands arguing that the arbitration award had been won by fraudulent means. KBC then sought and was granted an antisuit injunction by the Southern District of New York.

The Second Circuit affirmed, holding that even after satisfaction of the judgment "federal courts have continuing jurisdiction . . . to enjoin a party properly

before them from *relitigating* issues in a non-federal forum that were *already decided* in federal court." 500 F.3d at 129 (emphasis added). In other words, a district court may issue a foreign antisuit injunction post satisfaction of the judgment when ""a prior court has reached a judgment on the *same* issues."" *Id.* at 120 (emphasis added) (quoting *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004) (quoting *Laker Airways*, 731 F.2d at 928 n.53)).

Goss, on the other hand, does *not* raise a relitigation issue. The domestic lawsuit concerned whether TKS violated the 1916 Act by importing or selling large newspaper printing presses ("LNPPs") from Japan in the United States at prices substantially less than the actual market value or wholesale prices of such presses in Japan with the intent of destroying or injuring the U.S. LNPP industry. See 15 U.S.C. § 72 (repealed 2004). In contrast, the Special Measures Law authorizes companies, such as TKS, which are compelled to pay damages under the 1916 Act, to seek indemnification in Japanese courts from any Japanese affiliate of the U.S. company that obtained such damages. Findings of liability and satisfaction of that judgment are a prerequisite to commencing an action under the Special Measures Law, and a Japanese court has no authority to reconsider the issues decided in a lawsuit under the 1916 Act or to conclude that TKS did not violate that Act.

Accordingly, the court below found:

> The issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction. TKS now seeks to litigate in Japan a cause of action solely available in Japan and not previously

> litigated in the antidumping litigation. The issues are not the same simply because TKS's cause of action under the Special Measures Law rests on the imposition of an adverse judgment against TKS under the 1916 Act.

Pet. App. 23a.[2]

Far from "expressly reject[ing]" the *Goss* decision, Pet. at 13, the Second Circuit recognized that its determination that a particular judgment was being relitigated distinguished its case from *Goss*. Indeed, the court sought to forestall any claims based on an asserted inconsistency with *Goss* by emphasizing the lack of a conflict between the two courts: "*[m]oreover* as *Goss* suggests, a federal court may in some circumstances (*not presented here*) have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course." *Karaha Bodas Co.*, 500 F.3d at 129 n.20 (emphasis added). *Goss*, too, is inconsistent with petitioner's broad premise. There the court of appeals stated, "we reach no categorical conclusion regarding the propriety of the issuance of an anti-suit injunction in all cases involving the preservation of a judgment." Pet. App. 29a n.9. No disagreement exists here; to the contrary, the decisions reinforce one another.

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[2] The Eighth Circuit noted that "the doctrine of res judicata should apply as a defense to further litigation of the *same* issues." Pet. App. 22a (emphasis added). Because, by commencing an action under the Special Measures Law, TKS would not be relitigating the issues involved in the litigation of the 1916 Act, it would not be challenging the res judicata effect of the U.S. court's judgment.

II. THIS CASE PROVIDES NO OPPORTUNITY FOR THIS COURT TO ADDRESS PERCEIVED DIVERGENCES AMONG THE CIRCUITS REGARDING THE TREATMENT OF INTERNATIONAL COMITY.

Petitioner points to an inter-circuit divergence over the treatment of international comity when considering a foreign antisuit injunction, Pet. at 19, but this case presents an exceptionally poor vehicle for addressing that issue. The Eighth Circuit independently recognized petitioner's failure to meet the prerequisites that would justify any consideration of international comity. Moreover, an antisuit injunction in this case would offend principles of international comity under any applicable standard.

A. All Courts Of Appeals Concur That Only Foreign Litigation Of The Same Issues Is A Suitable Subject For A Foreign Antisuit Injunction.

At the outset, petitioner's claim that this case would be a good vehicle to address the inter-circuit divergence over the treatment of international comity fails because the Eighth Circuit rejected the antisuit injunction on the threshold basis that any Japanese action would not be a relitigation of the U.S. domestic action. The court observed that once one court reaches final judgment, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." Pet. App. 22a (citing *Laker Airways*, 731 F.2d at 939).

Indeed, the Eighth Circuit's approach is consistent with that of *every* court of appeals that has considered the prerequisites for a foreign antisuit injunction – namely, the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits.

In *Laker Airways*, the D.C. Circuit set the pattern by recognizing that a court may protect its jurisdiction from relitigation of the same issues. 731 F.2d 909, 927-28 (D.C. Cir. 1984). The court was concerned with protecting the res judicata effect of its judgment, not with whether a party may commence an action in a foreign jurisdiction under foreign law that has different elements from those involved in the domestic action. Indeed, *Laker Airways* explicitly endorsed the right of a foreign defendant to seek relief against a U.S. plaintiff in the courts of the defendant's country. *Id.*

Other circuit courts have similarly focused on whether the foreign and domestic suits present identical or overlapping issues. See *Quaak* v. *Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) ("The gatekeeping inquiry is, of course, whether parallel suits involve the *same* parties and issues. Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an international antisuit injunction.") (emphasis added); *Paramedics Electromedicina Comercial, Ltda* v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004) ("An anti-suit injunction against parallel litigation may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined."); *Gen. Elec. Co.* v. *Deutz AG*, 270 F.3d 144, 158 (3d Cir. 2001) (finding that foreign antisuit injunction may be granted to sustain res judicata effect, which requires "a final judgment on the merits in a prior suit involving the same parties or their privies, and a subsequent suit based on the *same* cause of action") (emphasis added); *Kaepa, Inc.* v. *Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996)

(holding that the district court did not abuse its discretion in issuing foreign antisuit injunction when party alleged "mirror image claims" in foreign jurisdiction); *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir. 1992) ("'[P]arallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, *at least until a judgment is reached in one [jurisdiction] which can be pled as res judicata in the other*.'") (second alteration in original) (second emphasis added) (quoting *Laker Airways*, 731 F.2d at 926-27); *Allendale Mut. Ins. Co.* v. *Bull Data Sys., Inc.*, 10 F.3d 425, 433 (7th Cir. 1993) (considering that the "inability to plead res judicata might deprive [the plaintiff] of the benefit of its judgment," affirmed the district court's issuance of an antisuit injunction which involved simultaneous actions concerning the same liability); *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) ("In applying this test, we believe the first step in determining whether an anti-suit injunction is appropriate is to determine whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined." (internal quotation marks omitted)); *Canon Latin Am., Inc.* v. *Lantech (CR), S.A*, 508 F.3d 597, 601 (11th Cir. 2007) (per curiam) ("As an initial matter, a district court may issue an anti-suit injunction only if: (1) the parties are the same in both the foreign and domestic lawsuits, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined.") (internal quotations and alteration omitted).[3]

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[3] Further belying petitioner's claim of a split with the Second Circuit is *Karaha Bodas Co.*'s reiteration of this same principle: "[A]n anti-suit injunction against foreign litigation may be

Because courts only consider comity concerns after these threshold requirements are met, petitioner's assertion of the inter-circuit split on this issue is irrelevant to the proper disposition of this case. Pet. App. 22a (noting that when relitigation is not at issue, "the role of comity for antisuit injunction purposes essentially is moot"); see, *e.g.*, *Canon Latin Am.*, 508 F.3d at 601 ("Once these threshold requirements are satisfied, courts must then consider additional factors to determine whether an injunction is appropriate."); *Quaak*, 361 F.3d at 18 (stating that "[i]f – and only – if' threshold requirements are met should the court analyze international comity considerations); *Paramedics*, 369 F.3d at 652 ("Once past this threshold [for an anti-suit injunction], courts are directed to consider a number of additional factors, including whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum."); *E. & J. Gallo Winery*, 446 F.3d at 991 (reaching comity considerations after determining that the threshold requirements were met).[4]

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imposed only if two threshold requirements are met: '(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.'" 500 F.3d at 119 (quoting *Paramedics*, 369 F.3d at 652).

[4] Nor do any of the cases cited by petitioner support a contrary conclusion. For example, in *Commercializadora Portimex S.A. de CV* v. *Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645 (E.D. La. 2005), the district court permanently enjoined the plaintiff from bringing suit in Mexico because: (1) it would be an inequitable hardship for the defendant to litigate the *same* claims again in a foreign jurisdiction; (2) it would be "clearly inefficient to permit parties to thwart the finality of judgments by relitigating the *same* claims once they have been fully adjudicated"; and (3) "the litigation in Mexico is *duplicative* of

B. Under Any Circuit's Comity Standard, Issuance Of A Foreign Antisuit Injunction Would Be Inappropriate On These Facts.

Even if this case did involve foreign court relitigation of domestically-resolved issues, this case would be a poor vehicle to address divergent approaches to the treatment of international comity, because those considerations weigh heavily against granting a foreign antisuit injunction under any standard. "Under either the conservative or liberal approach, '[w]hen a preliminary injunction takes the form of a foreign anti-suit injunction, [courts] are required to balance domestic judicial interests against concerns of international comity.'" Pet. App. 10a (alterations in original) (quoting *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003)).

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the litigation that took place before [the district court]." *Id.* at 649-50 (emphasis added). Similarly, in *Silva Run Worldwide Ltd.* v. *Gaming Lottery Corp.*, 53 F. App'x 597 (2d Cir. 2002), the Second Circuit affirmed the district court's decision to enjoin the former president of an internet gaming operation from pursuing an incipient lawsuit for attorney malpractice brought in Canada against his and the company's former counsel. *Id.* at 597-98. The district court previously had resolved an ancillary dispute between the former president, the company, and their counsel, which included allegations of attorney malpractice that had been raised but not pursued. *Id.* at 598. In the second lawsuit, the district court issued an antisuit injunction to avoid "vexatious relitigation" of matters that were or could have been raised in the first U.S. action. *Silva Run Worldwide Ltd.* v. *Gaming Lottery Corp.*, Nos. 96 Civ. 3231(RPP), 96 Civ. 5567(RPP), 2002 WL 975623, at *9-10 (S.D.N.Y. May 9, 2002). None of these cases, or any other case cited by Goss, indicates that a U.S. court may seek to prevent a foreign national, such as TKS, from having recourse to its own courts for relief under a foreign statute that does not involve issues that have been resolved by U.S. courts.

The Special Measures Law reflects a wholly legitimate act by the Government of Japan to protect its nationals from a continuing violation by the United States of its international obligations. Japan enacted the Special Measures Law following extensive proceedings in the WTO and the failure of the United States fully to comply with the WTO rulings. The 1916 Act was found by two WTO panels to violate the WTO Agreement. Pet App. 5a n.3. The panel handling Japan's complaint suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act." Complaint by Japan, Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS162/R, *supra*, ¶ 6.292, at 205. Despite repeated assurances by the United States to Japan and other Members of the WTO to the contrary, Congress only prospectively repealed the 1916 Act. See Communication from the Arbitrator, WT/DS162/21 (Mar. 4, 2002). The legislative history accompanying the 1916 Act's repeal suggests that Japan enacted the Special Measures Law because the Japanese Diet considered it a necessary response to the United States' continuing violation of its international obligations. See H.R. Rep. No. 108-415, at 5.

In addition, petitioner's argument incorrectly assumes that an action in Japan directly undermines the federal courts' jurisdiction and the particular judgment here. Pet. at 16. As discussed above, an action under the Special Measures Law is predicated upon, and does not relitigate, the validity of the U.S. judgment. Instead, the Special Measures Law allows Japan to assert its rights under international law pursuant to the WTO's repeated findings that the 1916 Act was inconsistent with the United States' obligations under the WTO Agreement.

The Government of Japan did not pass the Special Measures Law simply because it disapproved of the 1916 Act or found the treble damages remedy offensive. Japan passed the Special Measures Law only after the WTO had determined that the 1916 Act was inconsistent with the WTO Agreement, and that the United States had "nullified" the rights of Japan under that Agreement.

Consequently, the issuance of a preliminary injunction prohibiting TKS from commencing an action under the Special Measures Law would be clearly destructive of international comity under any standard, inasmuch as it entirely disregards the balance of remedies and obligations established by the WTO, to which both the United States and Japan have acceded. The court of appeals' holding, therefore, is wholly consistent with "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

III. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH NO DECISION OF THIS COURT.

Amici law professors seek to demonstrate that the court of appeals' view of ancillary or supplemental jurisdiction is somehow needlessly "confine[d]," in conflict with this Court's decisions. See Law Professors' *Amicus* Br. at 8. The most direct rebuttal is that petitioner itself has failed to perceive or assert any such conflict. In addition, the court of appeals articulated its understanding that there may, indeed, be reasons supporting ancillary jurisdiction more broadly in other contexts, but that no jurisdiction existed on these unique facts. Pet. App. 29a n.9. The

Goss court had no occasion to address the broad question posed by the law professors – whether a federal court will usually possess ancillary jurisdiction after a judgment has been satisfied.

Instead, the Eighth Circuit's decision accords with the general rule, articulated by this Court, that a court retains jurisdiction "*until* satisfaction of the judgment." Pet. App. 21a (citing *Peacock* v. *Thomas*, 516 U.S. 349, 356-57 (1996) (emphasis in original)). Once, however, a judgment is satisfied, there must exist a close connection between the separate proceedings before a court would have jurisdiction – post satisfaction of a judgment – to enjoin litigation occurring elsewhere. See *Peacock*, 516 U.S. at 358 (noting that "[i]n determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief sought is of a different kind or on a different principle than that of the prior decree" (internal quotation marks, citations, and alteration omitted)). The Eighth Circuit's fact-bound jurisdictional determination does not conflict with this, or any other, Court precedent. See also *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988) ("[A] federal court [may] prevent state litigation of an issue that previously was presented to and decided by the federal court. [This power] is founded in the well-recognized concepts of *res judicata* and collateral estoppel."); *id.* at 150-51, (affirming anti-suit injunction protecting from relitigating a ruling in earlier federal judgment of dismissal); *cf.* 17A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, *Federal Practice & Procedure* § 4226 (perm. ed. 2007) ("No independent basis of jurisdiction is required for

a federal court to entertain an application to enjoin *relitigation* in state court.") (emphasis added).

Nothing in the Eighth Circuit's decision suggests that it contains a broad holding, as implied by the professors, that subject matter jurisdiction terminates whenever a judgment is paid. Rather, the court of appeals cited *Peacock* only for the limited proposition that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment." Pet. App. 21a. *Goss* simply addresses the particular issues that arise in this case when ancillary jurisdiction cannot be immediately assumed. Indeed, in reaching its conclusion that no ancillary jurisdiction existed here, the court of appeals largely agreed with the law professors that, among the important jurisdictional considerations, courts should look to the ability of the court to function. See Law Professors' *Amicus* Br. at 12 n.16. The *Goss* court concluded, rightly, that the ability of a court to function was not implicated by the foreign action in this case and thus auxiliary jurisdiction does not attach. Pet. App. 21a-23a. Whatever the law professors may think of that ultimate determination, the court of appeals' reasoning was sound and well grounded in this Court's relevant precedents.[5]

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[5] The law professors additionally rely on the Court's holdings in *French* v. *Hay*, 89 U.S. (22 Wall.) 250 (1874), and *Dietzsch* v. *Huidekoper*, 103 U.S. 494 (1880), to argue that antisuit injunctions may be properly issued to prevent the nullification of a federal judgment. As discussed above, *Goss* in no way holds that federal courts are generally without the power to issue antisuit injunctions. The professors' emphasis of the Court's recognition of this power in *French* and *Dietzsch* is therefore without consequence here. Moreover, as discussed *supra* pp. 11-12, the professors' premise that a Japanese action brought pursuant to the Special Measures Law would effect a

IV. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Amici States of New Hampshire and Oregon argue that this Court's review is warranted because Japan's clawback statute – indeed, all clawback statutes – threatens to undermine U.S. domestic courts' ability to effectuate their domestic law judgments. The States argue that this case provides an opportunity for this Court to endorse an unprecedented policy against recognizing foreign clawback statutes in U.S. domestic courts. States' *Amici* Br. at 4-6. As important as these issues may be, no decision by this Court supports the States' desired outcome, and this case presents no opportunity to address the broader issues raised by the two States. Those issues are, at their core, quintessential foreign affairs considerations traditionally addressed on a bilateral diplomatic basis between nations.

Initially, the two States err in asserting that the "judgments" of the district court would be affected in any way by an action in Japan under the Special Measures Law. See *id.* at 10-12. To the contrary, what is at stake is the authority of a *Japanese* court to entertain and adjudicate a claim by a *Japanese* entity that was properly commenced pursuant to domestic *Japanese* law. As canvassed above, the Special Measures Law authorizes TKS's claims

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nullification of the domestic action is unsound. Any action separately brought in Japan would be predicated not upon some theory of the U.S. judgment's impropriety but, rather, would necessarily acknowledge the validity of that domestic judgment. Thus, any potential Japanese action could not be a relitigation and would not then raise the question this Court addressed in both *French* and *Dietzsch* – namely, the contours of federal court power to issue an antisuit injunction in protection of its judgment when a state court action would otherwise proceed to address the *same* issues.

against the Japanese affiliate of Goss under an entirely different cause of action, requiring distinct facts and separate proofs. The U.S. lawsuit under the 1916 Act, other than the bare fact of TKS's payment of damages, will have no relevance to the action in Japan. For this reason, the cases of this Court briefly cited by the *amici* States, see *id.*, are readily distinguished.

More importantly, Japan's clawback statute is unlike other clawback statutes that have generated controversies with foreign governments in the past. Japan enacted the Special Measures Law only after and pursuant to extensive WTO proceedings to correct an unjust result arising from the continued application of the 1916 Act affecting one of its nationals. Japan's law therefore focuses in a limited way on the harm generated by the United States' violation of the WTO Agreement through its failure to repeal the 1916 Act comprehensively – precisely the calibrated response that is anticipated by the Agreement. The international comity considerations weighing in favor of this particular clawback statute are far different from those supporting other clawback statutes. If the two States nonetheless believe that a clawback statute – even of this limited nature – is improper, the appropriate form of redress is diplomatic, not judicial.

Moreover, the Special Measures Law is also distinguished from most other clawback statutes in that it is a targeted measure that applies only to one dispute. As the Eighth Circuit emphasized, "[t]he Special Measures Law has a one-time application: There is no pending litigation under the now-defunct 1916 Act; Goss received the only judgment ever granted under the Act; thus, the only lawsuit possible under the Special Measures Law can be brought

against Goss alone." Pet. App. 24a. Consequently, this case presents a poor backdrop to consider the finding that the two States invite – a categorical holding that *all* foreign clawback statutes deprive a U.S. court of its jurisdiction and *all* foreign actions under a clawback statute should be enjoined. States' *Amici* Br. 4-6. In any case, if this is a recurring issue as claimed by New Hampshire and Oregon in their brief, significantly better vehicles to address this issue will be available to the Court in the future.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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January 9, 2008